No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,

Solicitor General

[redacted]

MORTON HOLLANDER,

STEPHEN LEONARD,

DOMINICK L. MANOLI,

FREDERICK U. REEL,

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v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on October 4, 1956, modifying, at the instance of District 50, United Mine Workers of America, the Board's order against Bowman Transportation, Inc.

OPINIONS BELOW

The majority and dissenting opinions of the court below (Appendix, *infra*, pp. 12–27) have not yet been reported. The findings, conclusions, and order of the Board (R. 675–703, 714–719) are reported at 112

NLRB 387, and its Supplemental Decision and Order (R. 730–736) is reported at 113 NLRB 786.[1]

JURISDICTION

The judgment of the court below was entered on October 4, 1956 (Appendix, *infra*, pp. 27–28). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Having found that the employer in this case rendered unlawful assistance to a labor union (District 50), the Board prescribed its customary remedy directing the employer, *inter alia*, to withhold recognition from that union unless and until it was certified by the Board as the bargaining representative of the employees. The first question presented is whether application of this remedy is in excess of the Board's authority because the union's failure to meet the filing requirements of Section 9 (f), (g), and (h) makes it currently ineligible for certification.

2. Whether, assuming that the Board's order was in excess of its authority, the court of appeals erred in rewriting the order instead of remanding the case to the Board.

3. Whether the court below improperly interfered with the agency's discretion in fashioning its remedy by eliminating from the Notice prescribed by the

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[1] Of the voluminous record in this case, the Court, for purposes of the instant petition, need be concerned only with pages 675–736.

Board all references to the Teamsters Union (the union disadvantaged by the employer's several unfair labor practices).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) are reprinted in the Appendix, *infra*, pp. 28–34.

STATEMENT

I. THE FINDINGS, CONCLUSIONS, AND ORDER OF THE BOARD

Following the customary unfair labor practice proceedings before a Trial Examiner of the Board, the Examiner found that Bowman Transportation, Inc. had violated Section 8 (a) (1), (2), and (3) of the Act in that it (a) engaged in surveillance over its employees at a meeting of the Teamsters Union;[2] (b) interrogated employees regarding their activities on behalf of the Teamsters; (c) discriminated against two employees for supporting the Teamsters; and (d) illegally assisted and supported District 50[3] in that union's efforts to organize the employees (R. 675–701). The Examiner recommended that the Board order Bowman to cease and desist from its unfair labor practices; to make whole the employees discriminatorily treated; to stop giving effect to its contract with District 50; and to withhold recognition from that union as representative of Bowman's em-

[2] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612.

[3] District 50, United Mine Workers of America.

ployees unless and until it was certified as such representative by the Board (R. 701–703). The Examiner further recommended that the Board order Bowman to post a Notice reciting, *inter alia*, that it would not, by unlawful discrimination, discourage membership in Teamsters or in any other labor organization (R. 703).[1]

Bowman filed exceptions to the Trial Examiner's report, challenging his findings, conclusions, and recommendations, but expressing no specific objection to the terms of the recommended Notice (R. 704–713). The Board, with minor modifications not here pertinent, approved the Examiner's report and adopted his recommended order (R. 714–719).

District 50 thereupon applied to the Board for a modification of the order insofar as it required Bowman to withhold recognition from District 50 as representative of the employees unless and until it was certified as such representative by the Board (R. 725–728). Pointing out that it had not complied with the filing requirements of Section 9 (f), (g), and (h) of the Act and hence was ineligible for certification, District 50 urged that the Board's order imposed an unlawful restriction on District 50's right to represent Bowman's employees and an unlawful penalty for non-compliance with the filing requirements of Section 9 (R. 725–728). The Board, in a Supplemental Decision, adhered to its original order (R. 732–736). Noting that a union's right to recognition

[1] Pertinent excerpts of the Trial Examiner's recommended Notice, inadvertently omitted from the Joint Appendix in the court below, are reprinted in the Appendix, *infra*, p. 35.

as exclusive bargaining agent derived solely from the Act, the Board declared that it was under a statutory duty to determine that such status was acquired free of employer assistance, and that it could best make this determination by means of a fair election (R. 732–734). The Board observed that the remedy invoked was far less drastic than requiring the complete disestablishment of the union, and that both of these remedies—disestablishment and withholding recognition until certified—have been judicially approved as proper exercises of the Board's powers (R. 733–734). Since the remedy was valid when applied to unlawfully assisted unions which had complied with the filing requirements of Section 9, the Board concluded that it was no less so as applied to District 50, reasoning that non-compliance by a union could not entitle it to preferential treatment (R. 734–736).[5]

II. THE DECISION OF THE COURT BELOW

The court below was unanimous in sustaining the Board's findings and conclusions with respect to Bowman's unfair labor practices (*infra*, p. 16). A majority of the court (Judge Washington dissenting) held, however, that the Board lacked authority to require that Bowman withhold statutory recognition from the

[5] The Board also noted that it thought the union's request for reconsideration was untimely, because it had not filed exceptions to the Intermediate Report (R. 732). The Board abandoned this position in the court below upon ascertaining that, as the result of a clerical inadvertence, the Union had not been officially served with a copy of the Report.

unlawfully assisted District 50 unless and until that union was certified by the Board (*infra*, pp. 16–19, 21–26). The majority's view was that this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71–72, precluded the Board from making certification a prerequisite to recognition (*infra*, pp. 16–17). The court directed that the Board's order, insofar as the order required Bowman to withhold statutory recognition from District 50 unless and until District 50 was certified, be modified by addition of the phrase "or shall have been freely chosen as such [statutory representative] by a majority of the employees after all effects of unfair labor practices have been eliminated" (*infra*, p. 18; see R. 715, 716). In so doing, the majority indicated that, in its view, the ill effects of the unfair labor practices would be removed by Bowman's compliance with the remaining terms of the Board's order, including the posting of notices for 60 days (*infra*, p. 19).

Finally, the majority of the court below modified the Notice prescribed by the Board, eliminating all references to the Teamsters Union (*infra*, pp. 19–21; cf. R. 717, 718). Its opinion states that the references to the Teamsters Union in the Board's proposed Notice are "susceptible of being construed" as indicating that the Board preferred the Teamsters and "might better be omitted so that the company's pledges of non-interference will apply to all labor organizations" (*infra*, pp. 19–20).

In his dissenting opinion, Judge Washington substantially adopted the views expressed by the Board

(*infra*, pp. 21–26; cf. R. 732–736). He further observed that assuming, *arguendo*, the invalidity of the Board's order, the court exceeded its authority in rewriting the order to incorporate a different remedy, instead of remanding the case to the Board (*infra*, pp. 26–27).

REASONS FOR GRANTING THE WRIT

1. The holding that the Board could not remedy the unfair labor practice of unlawful assistance by requiring that District 50 be denied recognition until it demonstrated its free majority in a Board representation proceeding is susceptible of two constructions, either one of which presents questions warranting review by this Court.

Under one construction, the Board's remedy would be valid as applied to unions which have complied with the filing requirements of Section 9 (f), (g), and (h) and invalid only as applied to unions, like District 50, which have not complied.[5] This results, as the dissent points out (*infra*, pp. 23–24), in rewarding non-compliance and in penalizing compliance with the filing requirements, thus frustrating the Congressional purpose in adopting those requirements (*Amer-*

[5] This appears to be the view of the Court of Appeals for the Fourth Circuit. See *District 50 v. National Labor Relations Board*, 234 F. 2d 565, quoted in both the majority and the dissenting opinions of the court below (*infra*, pp. 17, 23). The Fourth Circuit expressly recognized that the order here in question "would be appropriate if applied to a [complying] union * * *." 234 F. 2d at 571. No review was sought in that case because the court there remanded the case on the merits.

ican Communications Assn. v. *Douds*, 339 U. S. 382, 393).

The other possible construction is that the court regards the Board's remedy invalid as applied to any unlawfully assisted union, whether or not the union in question has met the filing requirements.[7] This construction, which results in invalidating a remedy repeatedly applied by the Board throughout its twenty-year history,[8] and uniformly approved by the courts,[9] likewise raises a question of importance in

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[7] Thus, the majority's opinion declares broadly (*infra*, p. 16):

> This leaves for consideration paragraphs 1 (d) and 2 (c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive bargaining representative so long as the union remains uncertified as such.
>
> We hold the Board does not have such authority. * * *

[8] Apparently the remedy was first applied in *Lenox Shoe Co.*, 4 NLRB 372, 388. It has since become a standard Board remedy in cases of unlawfully assisted unions. See, *e. g.*, the following annual reports of the Board: Eighth (1943), p. 30; Thirteenth (1948), pp. 50–51; Twentieth (1955), p. 75.

[9] See, *e. g.*, *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, 380 (C. A. 8); *National Labor Relations Board* v. *Parker Bros.*, 209 F. 2d 278, 279, 280 (C. A. 5); *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 209 F. 2d 622, 624, 625 (C. A. 5); *National Labor Relations Board* v. *Wemyss*, 212 F. 2d 465, 473–474 (C. A. 9); *Independent Employees Assn.* v. *National Labor Relations Board*, 158 F. 2d 448, 456–457 (C. A. 2), certiorari denied, 333 U. S. 826; see also note 6, *supra*.

the administration of the Act. The Board's order rests on the agency's view that, in order to remedy the unfair labor practice of unlawful assistance, it may be necessary and appropriate to require the employer to withhold recognition from the beneficiary of his unlawful aid (the union) until the latter has demonstrated, in a representation proceeding conducted under Board safeguards, that it represents a free and uncoerced majority of the employees. In the light of this Court's repeated admonition that "[t]he Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged" (*National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600, and cases there cited), the action of the court below in overturning a long-approved Board remedy warrants review by this Court.[10]

2. In addition to holding that the Board's order was improper, the court below prescribed an amendment to the order and entered a decree enforcing the order as amended. As this Court observed in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S.

[10] Contrary to the suggestion of the court below (*infra*, pp. 16-17), this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, is not dispositive of this case. In holding that a union's failure to meet the filing requirements did not authorize a state to infringe rights granted by the Act, this Court noted that the statute did not condition recognition upon compliance with the filing requirements (351 U. S. at 71-72), but the Court also noted that noncompliance did not exempt a union from other applicable provisions of the Act (*id.* at 70), including, presumably, the provisions of Section 8 (a) (2) dealing with unlawful assistance.

177, 194. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." The court below in undertaking to prescribe its own remedy for unfair labor practices entered a province which, as this Court has repeatedly emphasized, is reserved to the Board. *Link-Belt* case, *supra*, 311 U. S. at 600, and cases cited. The appropriate course, assuming the court's rejection of the Board's order, would have been to remand the case to the Board for the framing of a new order. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21.

3. Despite the fact that the point was not raised at the administrative level or in the review proceeding, the court, *sua sponte*, struck from the Notice to be posted by the Company all references to the Teamsters Union. This action is directly contrary to the settled principle that, absent special circumstances, courts of appeals may not consider matters not raised before the administrative agency. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389, and cases there cited; see also *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 493–494.

Apart from the court's error in considering a matter never brought to the Board's attention, we submit that the court's action in amending the Notice again manifests a failure to recognize that the fashioning of the remedy is the function of the Board.

Link-Belt case, *supra*. The Board's determination that the Notice expressly reassure the employees that they were free to join the Teamsters or any other union [11] was a proper, and certainly a reasonable, exercise of the Board's discretion, for the Teamsters were the prime target of the Company's unfair labor practices, and employees were spied upon, interrogated, and discharged because of activities on behalf of the Teamsters.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
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JANUARY 1957.

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[11] The court below apparently misread the Notice as not providing that "the company's pledges of non-interference will apply to all labor organizations" (*infra*, pp. 19-20; cf. R. 717-718, *infra*, p. 35).

APPENDIX

1. Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of National Labor Relations Board

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Decided October 4, 1956

Mr. E. Crampton Harris, with whom *Messrs. Yelverton Cowherd* and *Alfred D. Treherne* were on the brief, for petitioner in No. 12,887.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Wisconsin, *pro hac vice,* by special leave of Court, with whom *Messrs. Theophil C. Kammholz,* General

Counsel, National Labor Relations Board, *David P. Findling*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Nancy M. Sherman*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 12,887 and petitioner in No. 12,950, *Mr. Robert G. Johnson*, Attorney, National Labor Relations Board, also entered an appearance for respondent in No. 12,887 and petitioner in No. 12,950.

No appearance for respondent in No. 12,950.

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The National Labor Relations Board petitions for enforcement of its order which requires Bowman Transportation, Inc., an interstate trucking company, to cease and desist from certain unfair labor practices, and to redress them by taking the prescribed affirmative action. Bowman Transportation has not complained of the order and did not appear here. But District 50, United Mine Workers of America, which had been chosen by the Bowman employees as their exclusive bargaining representative but has not been certified as such by the Board, petitions us to review and set aside three paragraphs of the order by which it feels aggrieved.

The background of the Labor Board's order and its essential features may be quickly sketched. In November, 1953, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, undertook to organize Bowman's employees and established a picket line at its main terminal in Gadsden, Alabama. The Teamsters' efforts, opposed by the company, were unsuccessful but were still in progress, at least to the extent

of the picketing which a state court first enjoined but later permitted, with violence and disorder forbidden, when another labor organization appeared on the scene in May 1954.

The president of Bowman called a meeting of all employees for May 22, after having been told by some employees they wanted a contract, and after having conferred with organizers for District 50. The meeting was largely attended. Those present voted unanimously to be represented by District 50 and most of them signed authorization cards, whereupon Bowman recognized that union as the bargaining representative and entered into a contract with it.

Because of these events, the General Counsel of the Labor Board charged Bowman with several unfair labor practices. After a hearing the Board found: (1) that Bowman discriminatorily discharged driver Gross and removed driver Lackey from his regular run because of their activities in behalf of Teamsters, thereby discouraging membership in that union, an unfair labor practice within the meaning of § 8 (a) (3) of the Act; (2) that Bowman interfered with the administration of District 50 and contributed support to it and so engaged in unfair labor practices within the meaning of § 8 (a) (2) of the Act; and (3) that Bowman interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in § 7 of the Act, and thereby engaged in unfair labor practices within the meaning of § 8 (a) (1) of the Act.

Upon these findings, the Board ordered Bowman to cease and desist from: 1. (a) the unfair labor practices found by it; 1. (b) interfering with, restraining or coercing its employees in the exercise of their statutory rights; and from

> "[1] (c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between

for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts; (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies

> the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;
>
> "[1] (d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The portion of the order requiring affirmative action directed Bowman to offer reparations to drivers Gross and Lackey, and to

> "[2] (c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The order also required Bowman to post prescribed notices.

May 11, 1955, before enforcement of the order had been sought, District 50, which had not theretofore been a party to the proceeding, filed with the Board an application to modify the order by striking therefrom paragraphs 1 (c), 1 (d) and 2 (c), which we have reproduced above. The application was denied by the Board.

Part of the background of the Board's order is the fact that the Teamsters union had theretofore filed the information and affidavits described in § 9 (f), (g)

and (h) of the Labor Management Relations Act, 1947, while United Mine Workers of America, the parent union of District 50, has not filed thereunder. Teamsters was and is therefore eligible to be certified as the bargaining representative of Bowman's employees if it were chosen by them, but District 50, though chosen, may not be certified so long as its parent is in a state of noncompliance.

That Bowman had engaged in the unfair labor practices found by the Board clearly apears from the evidence. It was appropriate to order, as the Board did, that the employer correct its discriminatory treatment of drivers Gross and Lackey, and that it cease and desist from giving effect to its contract with District 50, which was unfairly arrived at through Bowman's illegal assistance to that union. In those respects the order should be enforced.

This leaves for consideration paragraphs 1 (d) and 2 (c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive bargaining representative so long as the union remains uncertified as such.

We hold the Board does not have such authority. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71–2 (1956), the Supreme Court observed that there is no statutory provision to the effect that a non-complying union "may not represent an appropriate unit of employees

if a majority of those employees give it authority so to do." The Court went on to say:

> "* * * Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representative. Section 8 (a) (5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9 (a)*.' (Emphasis supplied.) Section 9 (a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with § 9 (f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

In footnote 8, 351 U. S. at 72, the Court noted that "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."

In a recent case somewhat similar to this one,[1] Chief Judge Parker of the Fourth Circuit discussed the *Oak Flooring* opinion and said:

> "* * * If a cease and desist order were proper under the circumstances of the case, it should have been couched in language which would not have precluded representation of the employees by District 50 if chosen by a majority to represent them after all effects of any unfair labor practice had been eliminated."

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[1] *District 50, United Mine Workers of America* v. *National Labor Relations Board and Pittsburgh Valve Co.* v. *National Labor Relations Board*, 234 F. (2d) 565, 571 (4th Cir. 1956).

We adopt the language just quoted as applicable to this case. Paragraphs 1 (d) and 2 (c) are therefore improper and should not be enforced in their present form, since they preclude District 50 from representing the employees in the future, even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words "or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated."

With paragraphs 1 (d) and 2 (c) amended in the manner indicated above, and with the slight changes in the notice to be posted by the company which will hereinafter be suggested, we think the order will achieve the Board's proper objective, which is to eliminate the effects of Bowman's unfair labor practices so as to place Teamsters, District 50, employer and employees *in statu quo ante,* and to forbid and guard against future unfair practices by the employer, so that thereafter the employees and any and all unions concerned may work out the representation problem, untrammeled by any outside influence. When this objective has been reached, and if the employees then want a bargaining representative, they will be in a position to choose one in any manner which clearly indicates their desire. They may select non-complying District 50, or complying Teamsters, or any other complying or non-complying union, and the employer must recognize their choice. The only limitation is that, if the Board conducts an election, District 50 will not be on the ballot. Amended in the manner we have indicated, the order will be enforced.

There still remains, however, the necessity of deciding when the ill effects of Bowman's past practices

the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

have been removed. Certainly, one effect of Bowman's unfair labor practices is removed by requiring the offer of reparation to the two drivers. Another is eliminated by striking down the present contract, unfairly arrived at, between Bowman and District 50. The possibility of continuing effect is guarded against by ordering Bowman (1) to cease and desist from the labor practices found to be unfair; (2) to refrain in the future from engaging in those or any other unfair practices; and (3) to post notices for 60 days that, in obedience to the Board's order, it will make the required amends and will not in the future interfere in any way with the organizational efforts of any union, or with the employees' exercise of the rights guaranteed to them by law.

We think that, 60 days after the notices have been posted, it may reasonably and safely be assumed that normalcy has been restored by the Board's corrective order. Thereafter, if a Board election should be required and if the employees should therein select Teamsters or some other complying union as bargaining representative, the matter would be at an end. But, if in an election the employees should reject any and all candidates, or if no election is held, and if the employees should designate District 50 as their choice, that union will become the bargaining representative.

The form of notice to be posted by the company should be modified so as not to be inconsistent with this opinion. Moreover, the notice should not indicate that the Board prefers Teamsters. We suggest that references to that union in the Board's form of notice are susceptible of being construed as so indicating, and might better be omitted so that the company's pledges of non-interference will apply to all

labor organizations. We attach as an appendix what we regard as a proper notice.

The order under review will be amended in the manner set forth in the foregoing opinion. As so amended, the order will be enforced.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECREE

of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor

organization in a manner which constitutes interference, restraint or coercion in violation of § 8 (a) (1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representative by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by agreements made in conformity with § 8 (a) (3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ---------- By ----------
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

WASHINGTON, *Circuit Judge*, dissenting: I am constrained to disagree with the court's action in modifying the Board's order.

1. Section 10 (c) of the Labor Management Relations Act of 1947, 29 U. S. C. § 160 (c) (1952), authorizes the Board, when it finds that an unfair labor practice has been committed, to "cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this subchapter."[1] These policies include, among others, the elimination of unfair labor practices by employers and unions, and the protection of the employees' right to designate a bargaining representative of their own choosing, as expressed in Section 9 (a) of the Act.

It seems quite clear that a provision prohibiting an employer from recognizing a union unfairly controlled or supported by the employer until that union has been certified as the bargaining agent of the employees would in many cases be an important factor in purging unfair labor practices. In remedying such practices the Board has long inserted a provision of that sort in its orders. Even stronger action has sometimes been taken by the Board, and the Supreme Court has supported it. For example, employer-dominated unions have on occasion been ordered completely disestablished, with Supreme Court approval. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 (1940); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514 (1941); *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584 (1941). And in a case where the employer had assisted union A, the Board ordered him to deal exclusively with union B

[1] The subchapter referred to is that titled "National Labor Relations," which deals generally with the Labor Board, its powers, procedures, and jurisdiction.

(a rival), even though before the order was issued the Board had been advised that a majority of the employees wished to be represented by the assisted union. The order was upheld. *International Association of Machinists* v. *Labor Board*, 311 U. S. 72 (1940). In view of these precedents, the Board may surely take a less stringent course, and in an appropriate case order non-recognition by the employer of the assisted union as long as it remains uncertified. As to unions complying with the filing provisions of the Act, that conclusion would seem beyond question. As Chief Judge Parker said in *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565 (4th Cir. 1956):

> "* * * the form of order here entered [similar to that in the instant case] would be appropriate if applied to a union which had complied with the filing provisions of the Labor Management Relations Act * * *."

The question here, of course, is whether the fact that a union has not complied with the filing provisions of the Act, and refuses to comply, entitles it to special treatment by the Board. The Ninth Circuit has answered this question in the negative.[2] Yet the decision of the majority here, and of the Fourth Circuit in the *District 50* case, is to the contrary. The holding is—in substance and effect—that the Board cannot as a matter of law apply to a union which has not complied with the filing provisions of the law, and

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[2] See *National Labor Relations Board* v. *Womyss*, 212 F. 2d 465 (9th Cir. 1954), where the assisted union had not complied with Section 9 (f), (g), or (h) (see p. 470), and where the court held that the assistance given warranted issuance of "an order that the employer withdraw recognition from the favored organization unless and until it is certified by the Board after a fair election" (p. 472).

which has engaged in unfair labor practices, the very condition which it could rightfully apply to a complying union. I find no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act.

Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956), relied on by the majority, simply holds that noncompliance by a union with Section 9 (f), (g), and (h) of the Act does not open the door to the state courts to take action against the union that they would not otherwise be able to take. As I read that decision, it was intended to preserve and protect the authority of the National Labor Relations Board, not to undermine and weaken it. It can hardly be interpreted as holding that noncompliance by a union prevents the National Labor Relations Board from taking action which it is authorized to take against a *complying* union, and which the Act itself permits. It is true that the Supreme Court's opinion declares that "no consequences other than those so listed [in the Act] shall result from noncompliance." 351 U. S. at 73. But the context of this sttaement indicates that the Court was referring to consequences apart from those sanctioned by the Act itself. "Elimination of the Board [as a forum of resort by any union not complying with the filing provisions of the Act] does not, however, eliminate the applicability of the National Labor Relations Act, as amended * * *." *Id.* at 74.

2. The principle is now well established that the Board, and not the courts, is primarily charged with the responsibility of determining what provisions are best included in Board orders to carry out the policies of the Act. "The particular means by which the effects of unfair labor practices are to be expunged are

matters 'for the Board not the courts to determine' * * *. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co. v. Labor Board*, 319 U. S. 533, 539–40 (1943), citing *International Association of Machinists* v. *Labor Board*, 311 U. S. 72 at 82 (1940); *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584 at 600 (1941). The majority has not suggested that the Board's order does not effectuate the policies of the Act or that it was not intended to do so. Nor, as I view the case, could such a conclusion fairly be reached.

Concededly, if District 50 or its parent organization persists in refusing to file the required statements and affidavits, the Board's order will effectually preclude the employer from recognizing and contracting with District 50 as the employees' bargaining agent, even though the employees continue to favor it. But this restraint on the employees' freedom of choice is in part due to the attitude of the union, which has chosen not to comply with Section 9. Furthermore, if the Board properly concludes that the certification of the union in the normal way is necessary to dissipate the effect of the unfair labor practices, the order would tend to assure—rather than deny—the freedom of choice guaranteed by the Act by removing improper restraints on the employees. See *International Association of Machinists* v. *Labor Board*, 311 U. S. at 82; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. at 522.

The Board stated here that the disputed provision of its order was included "To remedy the effect of the illegal assistance to the UMW," and further that:

> "By its Order, the Board is merely directing that the UMW, like any other assisted union,

> demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion."

And with regard to its previous practice the Board stated:

> "However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible."

It is true that the Board did not expressly consider any alternative remedies—such as conducting an investigation at a later time to determine whether the effects of the unfair labor practices had by then been dissipated. But District 50 suggested no such alternative: it simply argued to the Board that the order was beyond the Board's power. When this argument was rejected, it appealed to this court on the same ground. As I have indicated, I think that ground is clearly untenable: in a proper case, the Board has power to enter an order of the present sort. And I think that this is such a case, and that the Board's findings were adequate to support its action—especially since it was never asked to consider any other type of action. But if this be doubted, *cf. Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946), the proper course for this court is to remand the case to the Board for further consideration. Certainly it is not within our province for us to rewrite the Board's order to choose a different remedy than it has chosen, and to direct that our new order be enforced.

See *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 (1940); *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952).

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2. Judgment below

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1956

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

OCTOBER TERM, 1956

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

On Petition for Review and on Petition for Enforcement of an Order of the National Labor Relations Board

Before: PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

ORDER AND DECREE

These cases came on to be heard on the record from the National Labor Relations Board and on a peti-

tion for review and a petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by the Court that the order of the Board on review herein be, and the same is hereby, modified as indicated in the opinion of this Court and, as so modified, will be enforced.

It is, therefore, ORDERED by the Court that the National Labor Relations Board shall within 10 days serve and file a proposed enforcement decree and form of notice conforming with the views set forth in the opinion of this Court. The provisions of paragraph (1) of Rule 38 of this Court shall apply thereto.

Dated: October 4, 1956.

Per Circuit Judge WILBUR K. MILLER.

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3. Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees,

raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization

of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 64

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 49–61) is reported at 237 F. 2d 585. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 3–26, 35–40) are reported at 112 NLRB 387, and its Supplemental Decision and Order (R. 43–48) is reported at 113 NLRB 786.

JURISDICTION

The judgment of the court below was entered on October 4, 1956 (R. 62–63). The petition for a writ of certiorari was filed on January 2, 1957, and was granted on February 25, 1957 (R. 70). 352 U. S. 999.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of

4. Trial Examiner's Recommended Notice

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

> WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 612, AFL, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment.
>
> * * * * *

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended October 22, 1951.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

U. S. GOVERNMENT PRINTING OFFICE 1956

STATEMENT

A. THE BOARD'S FINDINGS, CONCLUSIONS, AND ORDER

Following the customary unfair labor practice proceedings under Section 10 (b) of the National Labor Relations Act, a Trial Examiner of the National Labor Relations Board found that the employer in this case, Bowman Transportation, Inc., had violated Section 8 (a) (1), (2), and (3) of the Act (R. 24). Specifically, the Examiner found that, in order to defeat an organizational campaign by the Teamsters Union[1] among its employees, Bowman unlawfully interrogated employees regarding their activities on behalf of the Teamsters, engaged in surveillance of employees attending a Teamsters meeting, and discriminated against two employees for supporting the Teamsters (R. 5–17). The Examiner further found that, having rebuffed all attempts by the Teamsters to contact its president, Bowman thereafter unlawfully assisted and supported District 50[2] by negotiating a virtually complete bargaining agreement with its officials when District 50 did not, and Bowman had no reason to believe that it did, represent a single Company employee; by summoning employees from its various terminals to Company headquarters at Company expense where they were shown the contract they might expect if they selected District 50 as their bargaining representative, were required to disclose their opinion of District 50 in the presence of their supervisors, and were told that the Company would, if necessary, advance money to employees to pay their

[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612.

[2] District 50, United Mine Workers of America.

dues; by inviting District 50 to use the terminal for organizational purposes and permitting the terminal to be used for the election of officers; and, on the very day District 50 was designated by a majority of the employees as their bargaining representative, by signing a complete bargaining agreement with that union almost identical to the contract which the employees were shown before they voted for District 50 (R. 6–7, 17–21).[2]

To remedy these unfair labor practices, the Examiner recommended that the Board issue its usual order directing that Bowman cease and desist from its unlawful conduct; make whole the employees discriminatorily treated; cease giving effect to its contract with District 50; and withhold recognition from that union as representative of Bowman's employees unless and until it was certified as such representative by the Board (R. 22–26). The Examiner further recommended that the Board direct Bowman to post a Notice reciting, *inter alia*, that it would not, by unlawful discrimination, discourage membership in the Teamsters or in any other labor organization (R. 26).

Bowman filed exceptions to the Examiner's report, challenging his findings, conclusions, and recommendations but expressing no specific objection to the terms of the recommended Notice (R. 27–34). The Board, with minor modifications not here pertinent, approved the Examiner's report and adopted his recommended order (R. 35–40).

[2] Except for a provision concerning grievances, this contract was in all material respects precisely the same as that drafted before any of the employees had signed cards in District 50 (R. 19–21).